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PEMBINAAN WASMEGAH SDN BHD

v.

LOCAL ENGINEERING SDN BHD & ANOR

B

HIGH COURT MALAYA, KANGAR
MOHD ZAKI WAHAB JC
[CIVIL SUIT NO: 22NCvC-03-1-2013]
27 MAY 2014

C

TRUSTS: *Constructive trust - Fiduciary - Construction works - Failure to pay monies due to sub-contractor - Deed of assignment executed between first defendant and financier - Whether financier could only release money upon first defendant's instructions - Failure to receive instruction for payment - Whether constructive trust existed between sub-contractor and financier - Whether fiduciary relationship existed - Whether payment ought to be released to sub-*
D *contractor - Whether equitable relief granted*

EQUITY: *Equitable remedies and reliefs - Constructive trust - Construction works - Failure to pay monies due to sub-contractor - Deed of assignment executed between first defendant and financier - Whether financier could only*
E *release money upon first defendant's instructions - Failure to receive instruction for payment - Whether constructive trust existed between sub-contractor and financier - Whether fiduciary relationship existed - Whether refusal to pay was unconscionable - Whether equitable relief granted*

The first defendant, a construction company, obtained an award from
F Majlis Amanah Rakyat ('MARA') for construction works to build a new Maktab Rendah Sains Mara ('MRSM contract'). The second defendant, Affin Bank Bhd, was a financial institution and granted financing facility to the first defendant to carry out its obligations under the MRSM contract. Pursuant to the facility, the first defendant agreed to assign all
G its rights under the MRSM contract to the second defendant *vide* the deed of assignment dated 8 October 2008. MARA acknowledged the assignment and agreed to remit all payments due to the first defendant under the MRSM contract to the second defendant. Pursuant to this assignment, an escrow account was opened with the second defendant
H solely for the purpose of channelling the money received from MARA. In April 2012, the first defendant appointed the plaintiff as a sub-contractor to undertake the outstanding construction of the building under the MRSM contract. It was agreed between the first defendant and the second defendant that the latter would make payment directly
I to any particular party which the first defendant proposes and approved by the second defendant. Pursuant to this arrangement, it was agreed between the parties that upon the first defendant's instruction, all the

money due to be paid to the plaintiff under the MRSM sub-contract would be paid by the second defendant from the account. Subsequent to the instruction given by the first defendant, the second defendant paid progressive payments nos. 43 to 49 to the plaintiff for the construction work performed by it. Unfortunately, dispute arose between the plaintiff and the first defendant. On 8 January 2013, the first defendant terminated the plaintiff's services and the second defendant was notified about this matter. Prior to the termination, the plaintiff completed the construction work under progressive stages nos. 51, 52 and 53. Although MARA had paid the progressive payments, the second defendant did not pay the amount due to the plaintiff as no instruction to that effect was received from the first defendant. Hence, the plaintiff filed this suit against the defendants. A judgment in default was entered against the first defendant. The suit against the second defendant proceeded whereby the plaintiff submitted, *inter alia*, that the second defendant failed to pay the progressive payments due to it. However, the second defendant submitted that since there was no contractual relationship between the plaintiff and the second defendant, the plaintiff's claim in trust must fail. By virtue of O. 14A Rules of Court 2012, the question of law posed for determination was whether a constructive trust existed between the plaintiff and the second defendant.

Held (allowing plaintiff's claim):

(1) Trusts are an exception to the common law rule of privity of contract (*Takako Sakao v. Ng Pek Yuen & Anor*; refd). On the facts, the amount of money due under the progressive payment nos. 51, 52 and 53 had already been received by the second defendant and the second defendant stood in a fiduciary relationship with the plaintiff. Further, MARA had approved the payment and paid the money to the escrow account held by the second defendant. The special relationship between the second defendant and the plaintiff had created a trust relationship. (paras 28, 31 & 33)

(2) The second defendant was aware, *inter alia*, that the plaintiff had performed its obligation under the contract and was entitled to be paid by the first defendant. As such, the funds held by the second defendant were meant to be used to pay the plaintiff. The second defendant could not hide behind the absence of instructions to refuse its actual obligation to pay the plaintiff for the progressive claims that had been certified and paid by MARA. The said refusal was unconscionable and attracted equitable relief. (paras 30 & 31)

Case(s) referred to:

Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC ***(refd)***

Khor Kuek Jin v. Haji Yassin & Ors [1976] 1 LNS 51 FC ***(refd)***

PECD Bhd (In Liquidation) v. AmTrustee Bhd [2013] 9 CLJ 841 FC ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors and Another Appeal [2009] 2 CLJ 363 CA ***(refd)***

Legislation referred to:

Rules of Courts 2012, O. 14A

For the plaintiff - Tengku Ahmad Munawwir Tengku A Mustaff; M/s Tengku Munawwir, Chin & Solomon

For the 2nd defendant - Lau Kee Sern (Violet Liang Mi Tieng with him); M/s Shok Lin & Bok

Reported by Kumitha Abd Majid

JUDGMENT

Mohd Zaki Wahab JC:

Background

[1] In this case a dispute arose between the usual players of a booming and lucrative construction industry ie, the contractor, the sub-contractor and the most important constituent, the financier. The focus of this dispute, however, is that between the sub-contractor and the financier. The first defendant is a construction company. It obtained an award from Majlis Amanah Rakyat ('MARA'). The award was for a construction work to build a new Maktab Rendah Sains Mara, Arau, Perlis (hereafter referred to as the 'MRSM contract'). The first defendant, for reasons best known to itself did not carry out the entire construction work. Instead, by a letter dated 27 April 2012, the first defendant appointed the plaintiff as a sub-contractor to undertake the outstanding construction of the building under the MRSM contract. The amount agreed between the plaintiff and the first defendant for the sub-contract work was RM8,000,000.

[2] The first defendant, in turn, is a customer to the second defendant, a financial institution, engaged, among others in contract financing. At the request of the first defendant, the second defendant *vide*

a letter of offer dated 24 September 2008, granted to the first defendant financing facility. That facility is known as "Contract Financing Line Package 4" and is for a total sum of RM19,755,056. The purpose of the facility is mainly to finance the requisite financial needs of the first defendant to carry out its obligations under the sub-contract work for the MRSM contract.

[3] Pursuant to the facility granted by the second defendant, the first defendant agreed to assign all their rights under the MRSM contract to the second defendant. Accordingly, a deed of assignment dated 8 October 2008, was signed and executed between the first and the second defendant. The deed of assignment was duly registered with the Malaysian Companies Commission on 15 October 2008

[4] MARA was duly notified of the deed of assignment. MARA had acknowledged the assignment and accordingly agreed to remit all payments due to the first defendant under the MRSM contract to the second defendant. Pursuant to this assignment, an 'escrow account' was opened with the second defendant, whereby all proceeds and payments issued and received from MARA under the MRSM contract will be channelled to this account.

[5] Pursuant to the financing facility granted by the second defendant to the first defendant aforesaid also, an overdraft account was opened in favour of the first defendant. The first defendant is allowed the use the overdraft facility subject to the following terms:

(i) on demand or on written instruction from the first defendant to second defendant;

(ii) upon the submission by the first defendant to the second defendant an invoice or an approved claim from supplier or sub-contractor or consultant; and

[6] It was also agreed between the first defendant and the second defendant that the second defendant will make payment directly to any particular party for which the name is proposed by the first defendant and that is approved by the second defendant. By virtue of this arrangement the second defendant, from time to time, had released payments from the account to certain parties.

[7] Pursuant to the arrangement, the plaintiff was proposed by the first defendant to be one of such party. This proposal was approved by the second defendant. Consequently, by the similar arrangement, it was agreed that all the money due to be paid to the plaintiff under the MRSM sub-contract will be paid by the second defendant from the account, upon the instruction from the first defendant.

[8] Under the sub-contract agreement, the plaintiff will be paid according to the progress of the construction works performed by the plaintiff. The procedure of payment that was agreed was that the plaintiff will submit an application for payment to the first defendant for every stage of construction. MARA will then inspect the construction work together with the first defendant. Once MARA and the first defendant have approved the payment, MARA will deposit progressive payments into the account maintained with the second defendant. Subsequent to that, the first defendant will give instruction to the second defendant to make payment to the plaintiff. Following this arrangement, the second defendant paid to the plaintiff the progressive payments for the construction work performed by the plaintiff. It is pertinent to note that the parties agreed that the second defendant had paid the plaintiff money due under the progressive payments nos. 43 to 49 for the total sum of RM4,912,600.

[9] Unfortunately, dispute soon arose in between the plaintiff and the first defendant. In the main the dispute pertains to the performance of the plaintiff under the sub-contract agreement. At the height of the dispute, the first defendant terminated the plaintiff as the sub-contractor, on the 8 January, 2013. On the 8 January 2013 itself, the first defendant notified the second defendant on the termination of the plaintiff's service with the instruction that further payment from the account must no longer be made to the plaintiff.

[10] Prior to the termination of its service, the plaintiff had completed the construction work under progressive stages no. 51, 52 and 53. The plaintiff then submitted the claim for the progressive payments. Suffice to say the claim was approved by the first defendant and MARA. As agreed between the parties, MARA paid the progressive payments number 51, 52 and 53 to account maintained with second defendant. Nevertheless, the second defendant had not paid the amount to the plaintiff as no instruction to that effect was received from the first defendant.

[11] Dissatisfied with the termination of sub-contractor agreement by the first defendant and for non-payment of the progressive payments by the second defendant the plaintiff commenced this action against the first and second defendants. The plaintiff claimed against the first defendants for the following order:

(i) a declaration that the plaintiff's termination as a sub-contractor by the first defendant is not valid;

(ii) judgement for a sum of RM5,016,426.08 for work done by them under variation order with the interest of 5% per annum;

(iii) judgement for a sum of RM546,935.66 for goods and construction materials;

(iv) damages for loss of profit from the completion of the project;

(v) general damages for illegal termination of subcontract.

[12] In the statement of claim against the second defendant, the plaintiff claims for the following orders:

(i) the second defendant, with immediate effect is to pay directly to the plaintiff the progressive payments nos. 49 and 50; or in alternative the second defendant be restrained from releasing the progressive payments no. 49 and 50 to any third party including to the first defendant;

(ii) the second defendant is pay directly to the plaintiff the progressive payments nos. 51, 52 and 53 upon receiving them from MARA.

[13] In the course of the proceeding, the plaintiff applied for an injunction against the second defendant, restraining the second defendant from releasing the monies for progressive payment number 51, 52 and 53 to be paid to any one until the outcome of this suit. The second defendant consented to the order as applied by the plaintiff.

The Proceeding

[14] On 27 January 2014, the first defendant having failed to take any steps in the proceeding and not having entered an appearance, a judgment in default was entered against the first defendant. That judgment stands to-date and no application to set aside was ever filed.

[15] As regards to the plaintiff's claim against the second defendant, subsequent to the issuance of the injunction against the second defendant, the parties appeared before me for case management. During the case management, the plaintiff and the second defendant mutually agreed the facts that I have alluded to in the earlier part of this judgment. The parties also agreed the facts that the progressive payments claimed by the plaintiff were for the following:

(i) Progressive payment number 50 for the sum of RM493,354.74

(ii) Progressive payment number 51 for the sum of RM531,045.97

(iii) Progressive payment number 52 for the sum of RM260,841.49

[16] The parties have also agreed the second defendant had received progressive payments number 50, 51 and 53 from MARA and had not received any instruction from first defendant as to whom the payment ought to be made.

[17] Pursuant to that agreement of facts, the parties had also agreed to proceed the case under O. 14A of the Rules of Courts 2012, ie, for this court to determine a question of law. The question posed for determination is whether a constructive trust exist in the relationship between the plaintiff and the second defendant relating to progress payments nos. 50, 51 and 52. I then proceeded this case on that basis.

[18] At this juncture it is pertinent to refers to O. 14A which reads as follows:

> Order 14A. Disposal of case on point of law
>
> Determination of questions of law or construction (O. 14A, r. 1)
>
> 1. (1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -
>
> (a) such question is suitable for determination without the full trial of the action; and
>
> (b) such determination will finally determine the entire cause or matter or any claim or issue therein.
>
> (2) On such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.
>
> (3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.
>
> (4) The jurisdiction of the Court under this Order may be exercised by a Registrar.
>
> (5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provisions of these Rules.
>
> Manner in which applications under rule 1 may be made (O. 14A, r. 2)
>
> 2. An application under rule 1 may be made by a notice of application or, notwithstanding Order 32, rule 1, may be made orally in the course of any interlocutory application to the Court.

[19] I pause here to observe that the jurisprudence relating to the use and the manner in which an application under O. 14A may be made and dealt with by the court is well settled. There are numerous authorities that had examined and applied the said order. Suffice if I could refer to the oft-cited case of *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337 where the Court of Appeal stated as follows:

In a nutshell, the Order enables the court to determine any **question of law or construction of document** where it appears to the court that **such question is suitable for determination without the full trial** of the action and **such determination will finally determine the entire cause** or **matter** or **any claim** or **issue** therein. The Order is new to our civil procedure and hence, the few local decisions of the High Court on the ambit of O. 14A are not instructive. For that reason, we are inclined to refer to foreign cases decided on the equivalent of our O. 14A. In *Korso Finance Establishment Anstalt v. John Wedge* (unreported, 15 Feb 1994, CA Transcript No. 14/387), the English Court of Appeal laid down the following principles on the ambit of O. 14A:

1. An issue is "a disputed point of fact or law relied on by way of claim or defence".

2. A question of construction is well capable of constituting an issue.

3. If a question of construction will finally determine whether an important issue is suitable for determination under O. 14A and where it is a dominant feature of the case a court ought to proceed to so determine such issue.

4. Respondents to an application under O. 14A are not entitled to contend they should be allowed to hunt around for evidence or something that might turn up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If these were material circumstances of which the court should take account in construing the document, they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made. In the absence of such evidence the court should not refrain from dealing with the application. (see *The Supreme Court Practice* 1999 Vol 1 para. 14A/2/5).

In the same case it was held:

> In my judgment the question of construction is well capable of constituting an issue in the cause or matter. An issue may be said to be a disputed point of fact or law relied on by way of claim or defence. In the present case the determination of the question of construction one way or the other will finally determine an important issue, namely whether the respondents are primarily liable under the agreement. If the determination is in favour of the appellant it will finally determine the entire matter ...
>
> The whole case does not have to be disposed of. It is sufficient if substantial matters can be disposed of.
>
> The real question in this case at the end and really crucial one it seems to me is: will the court be able to dispose of the case or the

major part of the case or the most significant issue in the case under O. 14A dealing with the matter today. (@ 17C of the Transcript).

Clearly one would prefer the facts to have been simpler, but the fact that they are complicated does not rule out the use of the Order. (@ 7 of the Transcript).

In my judgment, having rightly decided that the issue could properly be disposed of without evidence and discovery, if he decided on the side of the plaintiffs, it would determine the action. In any event the question of construction was a dominant feature of the case, and the Judge ought to have proceeded to determine that issue. The postscript to his judgment, which refers to the desirability of the parties, as the Judge put it, 'having their day in Court', should have been tempered by the reflection that Order 14 A has lately been provided to avoid that expense and to assist parties in the efficient disposal of their actions. (@ 8 of the Transcript). (emphasis added).

This position was followed by the Singapore Court of Appeal and the High Court when dealing with O. 14 r. 12 of the Rules of Court, our equivalent of O. 14A, which recognized that resort to the procedure can be made to even where it does not dispose of the entire cause or matter (*re Payna Chettiar v. Maimoon Ismail & Ors* [1997] 3 SLR 387; *Microsoft Corporation & Ors Summit Holdings Ltd & Anor And Other Appeal* [1999] 4 SLR 529 and *Kamla Lal Hiranand v. Harilela Padma Hari & Ors* [2000] 3 SLR 696). Order 14A should be read, *inter alia*, with O. 14 (summary judgment) and O. 18 r. 19 (striking out pleadings and endorsements) (re The Supreme Court Practice 1999 vol 1, para 14A/0/2) and O. 14A r. 1(5) of both our Order and the English Order provide that nothing in the Order shall limit the powers of the court under O. 18 r. 19.

The principles established in the cases cited are of great persuasive force as they deal with similar provision of the civil procedure. Hence, we are inclined to follow them.

[20] With those principles entrenched in my mind I agree that this is a fit and a proper case to be dealt with under O. 14A. I then invited parties to file in written submissions in relation to the issue as framed above which the parties duly complied. In its submission the plaintiff canvassed that due to the relationship between the plaintiff and the second defendant; the second defendant had a fiduciary duty towards the plaintiff. This means that the second defendant's remaining role in all this is only to pay money received under the progressive payments to the plaintiff. By virtue of the existence of the fiduciary duty, a constructive trust existed whereby the second defendant is in effect is

holding the payments received from MARA under progressive payments number 51, 52 and 52 for the benefit of the plaintiff. In other words the position of the second defendant is a mere trustee and that the plaintiff is the ultimate beneficiary of the progressive payments aforesaid, more so when the first defendant and MARA had certified that the works had been properly carried out and that MARA had made payment for the work done.

[21] In reply the second defendant submitted that the contractual obligation to pay the plaintiff was created by subcontractor agreement entered into by the first defendant and the plaintiff and the second defendant was not a party to the agreement. There was no relationship had existed between the second defendant and the plaintiff and the duty of the second defendant to pay to the plaintiff is depending upon an instruction issued by the first defendant. In the case before me, it was argued that without the instruction received, there was no obligation on the second defendant to pay the plaintiff the amount so claimed. It was ultimately argued by the counsel for the second defendant that there was no fiduciary duty had been created in the relationship between the second defendant and the plaintiff and under the circumstance there was no constructive trust had exist in between the second defendant and the plaintiff.

The Decision

[22] Having considered submissions by the parties and having given the matter my most anxious consideration I agree with the plaintiff that a case of constructive trust had been made out. I hold that the second defendant is holding the payments received as regards to progressive payments nos. 51, 52 and 53, which were received from MARA on trust for the benefit of the plaintiff. I therefore allow the claim by the plaintiff. In the paragraphs below I shall allude as to how a have arrived at this decision.

Constructive Trust

[23] It is to be noted that the question whether or not a constructive trust raised in any relationship between the parties is a question of fact which must be determine from the facts of each particular case. There is no straight formula that would define the relationship as having given rise to trustee-beneficiary relationship. In *Khor Kuek Jin v. Haji Yassin & Ors* [1976] 1 LNS 51; [1976] 2 MLJ 70, the appellant was held to be a constructive trustee for money he had received from the State Government of Penang for compensation for part of land acquired by the State. The appellant sold the land to a buyer, who in turned sold

A the land to the respondent. The High Court ruled in favour of the respondent; that the appellant was a constructive trustee to the respondent. In deciding the issue, the Federal Court held:

> In our judgment the learned trial judge was right in holding that the appellant was in fact a constructive trustee of the money which had been paid to him on behalf of the purchasers.

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[24] The Federal Court in the case of *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949 had critically examined the nature of trust and explained the trust relationship in the following words:

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> A trust is an obligation enforceable in equity, which rests on a person as owner of some property, for the benefit of another or for the advancement of certain purposes (*Principles of the Law of Trusts* by HAJ Ford and WA Lee). As distinct to a trust for a purpose, a beneficial owner may enforce it by a suit as in the current case. Equity, which was historically dispensed by the Chancery Court, and against his person (ie, *in personam*) now compels the trustee to administer the trust in accordance with his conscience, with even a possible sanction of imprisonment until he has made good the loss caused to the trust property.

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E

[25] The Federal Court then examined the nature of express and constructive trust. As regards to the latter the Federal Court stated:

> From the various opinions above it may be construed that a constructive trust arises by operation of law irrespective of the intention of the parties, in circumstances where the trustee acquires property for the benefit of the beneficiary, and making it unconscionable for him to assert his own beneficial interest in the property and deny the beneficial interest of another. Being bereft of any beneficial interest, and with equity fastened upon his conscience, he cannot transfer any interest to himself let alone a third party. If he does, then a constructive trust comes into existence. An aggrieved party, by equitable remedy, may demand restitution of the property if he has been deprived of his beneficial interest.

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[26] In *Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors and Another Appeal* [2009] 2 CLJ 363, the Court Appeal viewed that:

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> [92] A constructive trust is simply a relationship created by equity in the Interest of conscience. According to *Snell's Equity*, 26th edn, at p. 201, a constructive trust is "a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties".

I

[27] On the facts of the case, the Court Appeal held that:

> [98] The 1st defendant has placed himself in a special position that was of a fiduciary nature. He conceded he never paid for the shares. He obtained the opportunity to continue owning the shares without regard to the fact that he never paid the said purchase price, ie, RM1.2 million to the deceased. An arrangement of this character to get the deceased to transfer the said shares to him without paying for it immediately and to defer payment give rise to relationship of a fiduciary character or trust, in favour of the deceased. The transaction involved nothing more than a transfer of the said shares to the 1st defendant and the fact is that the beneficial interest never left the deceased and simply remained where it had previously been. Thus it is a constructive trust. The 1st defendant was registered as the owner of the said shares but pending the payment of RM1.2 million it was held on an oral trust for the deceased. Except that the 1st defendant held the said shares on the register of members of HHMB, the transfer and registration made no difference as between the deceased and the 1st defendant. The deceased and now his estate is beneficially entitled to the said shares (now amounting to 4,580,600 shares) and could at any time call for the transfer of the said shares and be registered once again as its owner.

[28] Now, reverting to the facts before me, it was agreed and not disputed that the amount of money due under the progressive payment nos. 51, 52 and 53 had already been received by the second defendant. I am unable to accede to imply submission by the second defendant's that there must exist some form of contractual relationship between the plaintiff and the second defendant otherwise the claim in trust must fail. To my mind such an argument, which in reality in founded on the notion that there must be a privity of contract before a claim in trust can succeed, overlooked a simple but important point: that trust is an exception to contract. In the case of *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 the Federal Court underscored this important point by stating:

> Once it is recognised, as it was by the trial judge and as it ought to have been by the Court of Appeal, that the obligation sought to be enforced was a trust, it would have become apparent that the doctrine of privity of contract had nothing to with the fact pattern here. For it is settled law that trusts are an exception to the common law rule of privity of contract. See, *Beswick v. Beswick* [1968] AC 58.

[29] Having said that, it was submitted for the second defendant that the monies that it received from MARA became its money. Thus is due to its position as financier to the first defendant. It is an undisputed fact that the second defendant provided the facility to the first defendant and the facility was secured, *inter alia*, by the deed of assignment signed by the first defendant. It is to be recalled that under the deed of

assignment, the first defendant had agreed to assign all monies due to the first defendant from MARA under the MRSM contract. By virtue of the assignment, the money so due was paid by MARA to the second defendant. The second defendant created an escrow account solely for the purpose of channelling the money received from MARA. Under the circumstances, the second defendant contended that the monies become the second defendant's money. Furthermore, the second defendant contended that they have a duty to pay any money due to the plaintiff on a specific instruction by the first defendant. As far as the progressive payments nos. 51, 52 and 53, there were no instruction given by the first defendant. Under the circumstances, it was contended by the second defendant that they do not have any fiduciary duty toward the plaintiff.

[30] With respect, I am unable to accept the second defendant's submission. In my view, the special relationship between the second defendant and the plaintiff had created a trust relationship. In this case the second defendant at all times is aware that the plaintiff was contracted out by the first defendant to undertake the construction of the outstanding works under the MRSM contract. And it is also not in dispute that the second defendant is aware that the plaintiff had performed its obligation under the contract and were entitled to be paid by the first defendant and that MARA being the project owner had certified that work had been completed and were acceptable to them. This was evidenced by the payment made to the plaintiff under progressive payments nos. 43 to 49 for the total sum of RM4,912,600.

[31] What was also not disputed and agreed by the parties was that the plaintiff had completed the works due under progressive package nos. 51, 52 and 53 and they were approved for payment by MARA. In actual fact MARA had paid the money to the escrow account held by the second defendant. I make an important observation here that the claim for progressive payments was approved and acceded to by MARA (and accordingly paid to the second defendant) only on the ground that the works under the progressive stages were satisfactorily done. It is my observation that the monies paid by MARA for the progressive payments nos. 51, 52 and 53 were for the purpose of paying the contractor who had undertaken the work, ie, the plaintiff. It cannot be denied that the plaintiff was the one that had constructed them successfully and satisfactorily and as such in my view the money was meant to be paid to the plaintiff. To my mind and based on the evidence before me I am of the considered judgment the claims were not paid out by the second defendant simply because of the dispute between the plaintiff and the first defendant. I am unable to see that the fact that as financier the second defendant is entitled to a first bite to the funds kept

with the second defendant. What this means is that a financier, does not, *ipso facto*, have priority over the funds of borrower but kept by the financier. All facts must be considered to determine whether the funds, in fact, belonged to the borrower absolutely. In the present context and based on the conduct of the parties it is my respectful view that the funds being held by the second defendant, for all intent and purposes are meant to be used to pay the plaintiff. Thus the second defendant cannot hide behind the absence of instructions to refuse its actual obligation to pay to the plaintiff for the progressive claims that have been certified and paid by MARA. To my mind the refusal is clearly unconscionable and must attract equitable relief from this court.

[32] Support for my view can be obtained from decided cases. Suffices for me to refer to one of them. In *PECD Bhd (In Liquidation) v. AmTrustee Bhd* [2013] 9 CLJ 841, the Federal Court held that:

> [66] Accordingly, there is merit in the submission of learned counsel for the respondent that the 'purpose of the sum RM30 million was clearly specified, that is, to pay dividends to the noteholders and such purpose was known to all relevant parties. The appellant did not provide the said sum of RM30 million and as such the appellant did not have the beneficial interest in it that would have entitled the appellant to make a claim for it in the event the specific purpose could not be fulfilled'.

[33] On the facts in this case, I also found that the second defendant stands in a fiduciary relationship with the plaintiff as regard to the money it received from MARA being progressive payments nos. 51, 52 and 53.

[34] In the upshot I found that the second defendant is holding the money being payment for the progressive claims nos. 51, 52 and 53 on trust for the benefit of the plaintiff. I therefore allow the claim by the plaintiff.